Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Rules	)	
Regarding the Pricing of Unbundled	)	WC Docket No. 03-173
Network Elements and the Resale of	)	
Service by Incumbent Local Exchange	)	
Carriers	)	

COMMENTS OF COVAD COMMUNICATIONS

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I. Introduction

The Commission's TELRIC NPRM represents a significant juncture for competitive entrants, incumbents and the consumers and businesses that rely on competition in the telecommunications sector to deliver innovative new services and lower prices.[1] The Commission's NPRM could present the risk that incumbents are allowed to recover uneconomic rents from competitive entrants for access to bottleneck facilities – or provide the opportunity for the Commission to provide important clarifications in its pricing rules, rendering TELRIC pricing models more accurate representations of incumbents' true forward-looking costs for access to bottleneck facilities.

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses. As a facilities-based provider, Covad relies on incumbent LECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to its network, Covad is collocated in hundreds of central offices throughout the nation. As a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad is uniquely affected by the Commission's proceeding to reexamine the methodology used to set prices for access to the bottleneck facilities upon which Covad relies to reach its customers.

Covad supports the Commission's stated commitment to maintaining the existing requirement that UNE prices be developed according to a forward-looking cost mechanism.[2]

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[1] *See Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173, FCC 03-224 (rel. Sept. 15, 2003) (*NPRM*).

[2] *See NPRM* at para. 37.

Indeed, as the Commission's NPRM recognizes, forward-looking costs are the best means of ensuring that incumbents are not rewarded for the inefficiencies in their legacy networks – inefficiencies that are the direct result of more than one hundred years of rate-of-return regulation at both the state and federal level.[3] Instead, a forward-looking costing mechanism, properly applied and implemented, is the best means of ensuring that incumbents remove such inefficiencies over time and, through the continual process of capital and facilities investments, realize the efficiencies that would have arisen under competitive market conditions.

As the Supreme Court has recognized, TELRIC is working.[4] Citing the more than $55 billion in facilities investment by competitive entrants since the passage of the 1996 Act, the Court stated "a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities."[5] As the Commission's NPRM recognizes, virtually all states have now conducted at least one round of TELRIC rate-setting proceedings, with continuing review and adjustment of these rates – lending credence to the Supreme Court's characterization of such proceedings as "smooth-running affairs."[6] Given the familiarity and expertise that state commissions have now acquired in applying the Commission's pricing rules, it would be a mistake indeed to drastically rewrite the Commission's UNE pricing rules – and plunge competitors and investors alike into yet another round of roiling uncertainty.

Instead, Covad urges the Commission to adhere to its stated determination to require incumbents to price competitive access to unbundled network elements according to forward-

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[3] *See id*.

[4] *See Verizon v. FCC*, 122 S.Ct. 1646, 1675-1676 (2002).

[5] *Id.* at 1676.

[6] *See id.* at 1678.

looking economic costs. Covad also urges the Commission to adhere to its stated intent of making only minor modifications to the TELRIC rules to better capture these forward-looking costs, rather than resurrecting the specter of pricing according to incumbents' embedded or historical costs. Covad urges the Commission to revise its TELRIC rules, as proposed herein, to avoid over-recovery by the incumbents for costs they do not actually incur – for example, when competitors must pay for loop functionalities they may not access as UNEs under the Commission's *Triennial Review* decision, or when incumbents levy recurring charges in perpetuity for non-recurring costs.

Finally, Covad urges the Commission not to disrupt the processes already in place for competitors and incumbents to negotiate and for state commissions to arbitrate the prices of unbundled network elements. As the Commission knows, these proceedings often require a substantial commitment of time and resources from both companies and state commissions. In light of the pressures that state commissions are already facing to implement the recently released *Triennial Review Order*, Covad believes that it would be extraordinarily imprudent to subject companies and state commissions simultaneously to the pressures of conducting proceedings to revise existing rates for UNEs and interconnection. Accordingly, Covad urges the Commission not to create a mandatory timetable for state commissions to implement any changes it makes to its TELRIC rules. Rather, Covad believes it prudent for the Commission to allow state commissions to apply any changes to TELRIC during their next round of TELRIC ratemaking proceedings, when they determine that such proceedings are warranted. Until state commissions determine to initiate such proceedings, existing negotiated or arbitrated rates should continue to apply.

II. Impact of the Triennial Review

The Commission's *Triennial Review Order* provided wide exemptions from unbundling requirements for last-mile transmission facilities used to provide mass market broadband services.[7] The Commission created federal rules that completely exempted incumbent LECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.[8] The Commission created federal rules that completely exempted incumbent LECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as UNEs, in both new-build and overbuild situations.[9] Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,[10] and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based interfaces.[11] In sum, the Commission's *Triennial Review Order* already provides the incumbent LECs with a staggering amount of deregulation – for both mass market and enterprise loop facilities.

State commissions, however, have overwhelmingly found that, under a forward-looking cost methodology, an efficient network would include significant amounts of fiber plant, particularly in the feeder portion of the network. Indeed, the Wireline Competition Bureau itself in the recent *Virginia Arbitration Order* assumed the use of next-generation fiber-fed network plant in its development of UNE prices for Verizon Virginia.[12] Moreover, the Bureau modeled a

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[7] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

[8] *See Triennial Review Order* at paras. 285-297.

[9] *See Triennial Review Order* at paras. 273-284.

[10] *See Triennial Review Order* at paras. 535-541.

[11] *See Triennial Review Order* at paras. 298-342.

[12] *See Petition of WorldCom, et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon*

fiber fed network not only capable of supporting voice services, but capable of "transmission standards applicable for voice, data, video, sensor control, and other uses."[13] Indeed, as the Bureau determined, next-generation GR-303 digital loop carrier systems are "more advanced and efficient" than legacy TR-008 IDLC systems,[14] and similarly rejected Verizon's requests to include a UDLC component in its fiber plant mix, determining that all fiber feeder plant in its model should employ next-generation GR-303 digital loop carrier systems.[15]

Clearly, there is a tension between the Bureau's detailed, fact-based findings in the *Virginia Arbitration Order* regarding the efficiencies of next-generation fiber-fed digital loop carrier systems, and the Commission's unsupported assumptions in the *Triennial Review Order* regarding the need to provide additional incentives for incumbents to invest in such facilities by refraining from unbundling requirements. Nonetheless, Covad does not wish to relitigate here the specific conclusions reached by the Commission in the *Triennial Review Order*. Rather, Covad points out the tension between UNE rates developed under the assumption that competitors would be able to access the advanced services functionalities of next generation digital loop carrier systems (such as, for example, rates that could be developed using assumptions similar to those employed by the Bureau in the *Virginia Arbitration Order*) and the Commission's determination in the *Triennial Review Order* not to actually allow such access. Accordingly, Covad welcomes general direction from the Commission that, to the extent UNE prices do in fact include the costs of providing such next generation features and functions, such

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Virginia Inc., Memorandum Opinion and Order, CC Docket Nos. 00-218 and 00-251, DA 03-2738, at para. 310 (rel. Aug. 29, 2003).

[13] *See id.* at para. 241.

[14] *See id.* at para. 311.

[15] *See id.* at para. 312.

costs should be excluded from UNE prices where competitors are denied access under the Commission's *Triennial Review Order*.

The Commission should be exceedingly careful, however, that such general direction does not become an opportunity for abuse by incumbent LECs. In particular, the Commission's decision to exclude competitors from being able to access the next generation functionalities of network facilities that are "more advanced and efficient" than incumbent LEC legacy systems should not become an excuse to employ cost models based on outdated network assumptions – for example, the very network assumptions the Bureau rejected in the *Virginia Arbitration* cost proceeding. Competitors should not be forced to suffer the double injury of being precluded from accessing the "more advanced and efficient" broadband transmission functionalities the incumbents continue to deploy, while at the same time being forced to purchase what access remains available according to outdated assumptions based on inefficient legacy networks. Otherwise, under the guise of "forward-looking" costs, competitors could actually become subject to all the inefficiencies of legacy networks that the Commission sought to avoid by using a forward-looking cost methodology in the first place.

III. Specific Inputs

A. Real-World Network Attributes

Covad agrees with the Commission's desire to have TELRIC models more accurately reflect the "real-world attributes of the routing and topography" of incumbent networks in the development of forward-looking costs.[16] Most "real world attributes" can (and should) be accommodated within the economists' classic version of a long run planning horizon. However, the Commission must recognize the important distinction between "real world attributes" related

[16] *See NPRM* at para. 52.

to the underlying cost conditions facing a carrier, and those which are merely descriptive of the actual network that a particular carrier happens to be operating. In other words, the Commission must recognize the distinction between the "real-world attributes" that would face any carrier deploying network facilities (e.g., rights of way, roads, lakes, rivers, mountains) and the network attributes that are largely or entirely within the control of the carrier making such deployments.

Unless the Commission maintains this distinction, it will allow incumbents themselves to determine what compensation they are due for UNE access simply by reference to their own network planning decisions (both historically and currently, in the absence of full facilities-based competition) – rather than the network planning decisions that an efficient carrier would make under competitive market conditions. Instead, the Commission should focus its emphasis on real-world network attributes upon the cost conditions that are not within a carrier's control, and which would face an efficient carrier deploying facilities under competitive market conditions. For instance, the actual location of streets and other rights of way should be accurately reflected in a well-prepared long run cost study. Reducing the reliance upon truly "hypothetical" assumptions would substantially increase the accuracy of the TELRIC cost calculations – an improvement that would be entirely consistent with existing TELRIC principles, and which could be easily accommodated within the existing framework of TELRIC rules.

B. Long-Run Planning Horizon

Covad supports the features of the Commission's existing TELRIC rules that require cost models to be developed according to a long-run planning horizon. Specifically, under the Commission's existing TELRIC methodology, the long-run planning horizon is a period long enough for all of a firm's costs to become variable or avoidable.[17] Under this principle, one of

[17] *See NPRM* at para. 55 (citing *Local Competition Order*, 11 FCC Rcd at 15845, para. 677).

the clear advantages of the Commission's existing TELRIC methodology is that all of the incumbent's costs for providing unbundled access to an element are recovered, because none of its costs for providing that element are treated as fixed and sunk. Furthermore, all of these costs are recovered consistent with the prices that an efficient carrier in a competitive market would command. In real markets characterized by competition and low barriers to entry, the prices that any carrier could command in the marketplace would approach an efficient carrier's long-run costs. Although in actual marketplaces firms make their own individual decisions under both short-run and long-run planning horizons, any firm attempting to impose higher prices than those based on an efficient firm's long-run costs, for example, by attempting to recover for sunk expenditures in addition to short-run variable costs, would be priced out of the marketplace by a competitive entrant.

Thus, what is "hypothetical" about the existing TELRIC methodology is not its reliance on the development of long-run costs, but rather the lack of competitive market conditions that would produce wholesale prices according to an efficient carrier's long-run costs – due to the lack of competitive alternatives to the incumbents' last-mile transmission facilities. TELRIC prices are exactly the prices that incumbents would be able to charge for wholesale access to their facilities in a competitive marketplace – prices that are "hypothetical" only because such competition in alternatives to incumbent last-mile transmission facilities does not yet actually, and may never, exist.

Covad opposes any proposal to shift to a cost methodology based on short-run average incremental costs. In the case of UNE prices, the short-run planning decisions of incumbent LECs would reflect of all the inefficiencies of their past investment decisions – investment decisions formed, in large part, against the backdrop of more than one hundred years of rate-of-

return regulation. Moreover, incumbent LECs' short-run planning decisions are not reflective of the decisions a carrier in a competitive marketplace would make; incumbent LECs face little to no real competition for alternative last-mile transmission facilities capable of delivering the full suite of services that incumbent LECs deliver. Given the high barriers to entry that competitive facilities-based carriers face in entering historically monopoly telecommunications markets, incumbent LECs' short-range planning decisions are free to continue along the path of inefficient investment decisions for which the incumbent LECs have historically enjoyed full recovery – particularly if the Commission removes the incentives that the current long-run TELRIC cost methodology provides to eliminate such inefficiencies. As the Supreme Court has stated, pricing that remunerates the incumbents for such inefficiencies would merely:

> …pass on to lessees the difference between most-efficient cost and embedded cost. Any such cost difference is an inefficiency, whether caused by poor management resulting in higher operating costs or poor investment strategies that have inflated capital and depreciation.[18]

Moreover, the last-mile transmission facilities at issue are facilities without access to which competitors have already been found to be impaired by the Commission.[19] Given that competitors are so impaired, there is no reason for the Commission to expect that competitive entrants would dive into the market and develop alternative transmission facilities to the incumbent LECs', driving incumbent LECs' pricing closer to the long-run incremental costs of an efficient competitor as would happen in a real competitive marketplace. Instead, competitors would simply be forced to pay higher prices for the incumbents' inefficient investment decisions in order to be able to reach their customers, or in some cases simply give up on serving those

[18] *See Verizon v. FCC*, 122 S.Ct. at 1673.

[19] *See* 47 U.S.C. § 251(d)(2).

customers at all. As the Supreme Court stated, "The upshot would be higher retail prices consumers would have to pay."[20]

To the extent, however, that the Commission does decide to impose some form of short-run cost methodology, however ill-advised such an approach would be, Covad urges the Commission at the very least to be very clear about what it is doing. Specifically, Covad urges the Commission to be explicit in its adoption of a short-run cost methodology, and specifically identify the short-run time horizon against which it will measure the incumbent LECs' forward-looking network investments. Furthermore, Covad urges that, if the Commission does adopt a short-run cost methodology, it observe the cardinal economic tenet that "sunk costs are unrecoverable past costs."[21] In other words, if the Commission decides to shorten the planning horizon against which it will examine the costs of incumbent LECs' forward-looking investment decisions, it must not in any event allow incumbent LECs to recover both these short-run forward-looking incremental costs as well as their embedded or historic sunk costs for plant that is already purchased and which would not be replaced under the Commission's new short-range planning horizon. Otherwise, the Commission will depart from standard economic costing concepts, by allowing incumbent LECs to recover for sunk costs generally treated by economists as unrecoverable.

C. Fill Factors

Fill factors (essentially the same concept is sometimes described in terms of utilization rates) are estimates of the fraction of total plant that is actually being used. The amount of spare capacity reflected in the fill factors used in a long run cost study will directly impact the resulting

[20] *See Verizon v. FCC*, 122 S.Ct. at 1673.

[21] *See id.* at n. 17 (citing D. Carlton & J. Perloff, Modern Industrial Organization 50-74 (2d ed.1994)).

unit costs (e.g., cost per circuit or cost per minute of use). Excessively low fill factors raise the per unit costs and vice versa.

The key distinction between long run and short run costs is the extent to which the carrier is able to vary its plant mix and capacity to match demand for its output. In a long run planning horizon, the carrier can optimize its capacity to closely match its output. Accordingly, in a long run cost study, the amount of capacity should closely match the volume of circuits and traffic reflected in the study. There should be enough spare capacity to provide operational flexibility (e.g., the ability to quickly respond to fluctuations in the day-to-day level of demand), but not much more. Stated differently, in a long run cost study all costs, and thus all plant configuration details, are variable. Therefore, it isn't appropriate to incorporate unnecessary or inefficient levels of spare capacity in a long run cost study.

IV. Non-Recurring Charges

Covad strongly opposes any suggestion of establishing a "presumption that an incumbent LEC's current practices with respect to non-recurring activities are efficient."[22] Instead, Covad has every reason to expect that incumbent LEC non-recurring activities will be entirely inefficient and discriminatory when "competitive LECs are the primary users of a particular activity."[23] Indeed, as the Commission has now heard in numerous section 271 application proceedings,[24] as well as in the CHOICE Coalition's petition for a stay of the Commission's phase-out of line sharing,[25] excessive and discriminatory non-recurring charges for access to line

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[22] *See NPRM* at para. 119.

[23] *See id*.

[24] *See, e.g., SBC Communications Inc. Application for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Memorandum Opinion and Order, WC Docket No. 03-138, FCC 03-228, at paras. 127-143 (rel. Sept. 17, 2003).

[25] *See* Emergency Joint Petition for Stay By the CHOICE Coalition, CC Docket Nos. 01-338, 96-98, 98-147, Attachments A – D (filed Aug. 27, 2003).

splitting arrangements persist in many of the RBOC territories. Moreover, notwithstanding the Commission's reliance in the section 271 context on state commission collaboratives to solve these ongoing problems eventually, their persistence continues to this day, showing that further decisive action from the Commission is necessary. In any event, the last thing competitors trying to solve these problems need is guidance from the Commission that incumbents' existing practices with respect to non-recurring activities are presumptively efficient and TELRIC-compliant.

A. Non-Recurring Charges for Line Splitting

In this regard, the non-recurring charges for line splitting that the Commission recently reviewed in section 271 applications in the Ameritech territory clearly fail to comply with TELRIC principles. SBC has no cost studies supporting these rates, no state commission has directly considered these rates in a TELRIC cost proceeding, and SBC only disclosed the rates in compliance filings and in response to discovery requests. The rates themselves are grossly inflated and based on processes that either have no connection to line splitting or are unnecessary procedures whose only function is to increase CLEC costs. In these circumstances, SBC has not shown – and cannot show – that these rates comply with TELRIC.

The nonrecurring charges for line splitting must comply with TELRIC principles. Indeed, the Commission has long recognized that cost-based pricing for NRCs is critical to making competitive local telephone entry economically feasible.[26] Yet, in the SBC territory, no state commission has developed cost-studies and made a finding that the NRCs SBC seeks to

[26] *See, e.g.*, *AT&T Communications*, 103 FCC 2d 277, 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry"). *See also* 47 C.F.R. § 51.507(e) ("[n]onrecurring charges . . . shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element").

impose in connection with line splitting are consistent with TELRIC. In multiple states, the charges have been developed unilaterally by SBC and were never disclosed publicly during cost proceedings to allow state commissions to review the charges in light of TELRIC. In light of the lack of cost studies and the failure of SBC to demonstrate that the NRCs reflect the work activities associated with line splitting in connection with rate submissions during the state rate proceedings, it would be shameful indeed for the Commission to erect a presumption that these work activities and their attendant costs – cut out of whole cloth – are presumptively efficient and TELRIC-compliant.

In fact, the rates for line splitting NRCs are wildly in excess of appropriate TELRIC levels. For example, when a CLEC seeks to add data service to a UNE-P customer's line, the only necessary work is the provisioning of cross connect cabling between the elements (the loop and the port) and the collocation cage where the equipment that splits the loop is housed. Rather than base its approach on this type of simple operation, SBC claims that to provision line splitting, it must "break apart" the existing UNE-P configuration and reconnect it by cross connection to the collocation cage where the splitter is located. This, SBC claims, entitles it to assess multiple charges for disconnecting the UNE-P, separate service order and installation charges for reconnecting the loop and port, as well as other types of charges. This policy is blatantly discriminatory, contrary to the Commission's requirement of forward-looking costs, and designed solely to increase CLEC's costs.[27] SBC's line splitting NRCs are further inflated

[27] The Commission's *Line Sharing Reconsideration Order* requires SBC to "permit competing carriers to engage in line splitting *using the UNE-platform* where the competing carrier purchases the entire loop and provides its own splitter." *Line Sharing Reconsideration Order,* ¶ 19 (emphasis added) The Commission explained that, as it stated in its Texas 271 order, an incumbent has a "current obligation" to allow "a competing carrier . . . to provide combined voice and data services on the same loop" (¶ 18) and "must provide the loop that was part of the existing UNE-platform as the unbundled xDSL-capable loop, unless the loop that was used for the UNE-Platform is not capable of providing xDSL service." *Id.* ¶ 19.

by the fact that the NRCs used by SBC for some of the inappropriate activities are themselves not based on any cost studies but are proxies based on other UNE rates. For example, in Indiana, SBC has established an NRC called "Disconnect HFPL" that is based on its "Loop Service Order" NRC. This "Loop Service Order," however, has nothing to do with line splitting activities, is based on cost categories unrelated to line splitting, and recovers disconnect costs that are already included in various connection charges.

UNE-P to Line Splitting: This scenario involves the addition of data service for an existing UNE-P customer. To provide this service, all SBC must do is run cross-connects between the facilities providing the voice service and those facilities providing the data service. The total TELRIC rate for this activity should reflect ONLY that work effort. SBC has not conducted a cost study that computes the TELRIC cost of installing the cross connects required to establish a line splitting configuration, adhering to its indefensible position that line splitting arrangements require that SBC "break apart" the UNE-P configuration. The Texas state commission has, however, adopted cross-connect charges that reflect the appropriate work activities associated line splitting. The Texas cross-connect charges are $4.72 to connect the loop to the CLEC's splitter and $6.91 to connect the voice portion of the loop back to the switch port, for a total cross-connect charge of $11.63. These rates are based on a review of the particular capability being provided and the specific activities required. As such, they provide an

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In its recent order in the Indiana TELRIC proceeding, approved February 17, 2003, the Indiana Utility Regulatory Commission concluded that: "Ameritech has no basis for refusing to provide line splitting in conjunction with UNE-P." Order dated February 17, 2003, IURC Cause No. 40611(Phase II), at pp. 75-76. The Public Utilities Commission of Ohio, in the most recent AT&T/SBC arbitration, also sustained the ability of CLECs to use line splitting with UNE-P, stating: "the Commission agrees that Ameritech has the obligation to permit competing carriers to engage in line splitting using the UNE-P where AT&T purchases the entire loop and provides its own splitter." *Entry on Rehearing* dated October 16, 2001, PUCO Case No. 00-1188-TP-ARB, at ¶ 15. Finally, in Wisconsin, the Public Service Commission of Wisconsin, also in the context of the most recent AT&T/SBC arbitration, confirmed AT&T's right to engage in line splitting using UNE-P. *Arbitration Award* dated October 12, 2000, WPSC Docket No. 05-MA-120, at pp. 79-80. *See also* Final Decision, September 20, 2001, PSCW Docket No. 6720-TI-161 (the Wisconsin TELRIC Docket), at p. 124.

appropriate proxy for reviewing the reasonableness of SBC's line splitting NRCs across SBC's region, as the actual line splitting loop-connect work that must be performed will not vary from state to state.

By comparison, SBC has proposed nonrecurring charges in its compliance filing of $62.75 in Ohio and $58.51 in Indiana. These charges reflect SBC's invalid assumption that it is entitled to configure line splitting by first completely disconnecting the current voice CLEC's UNE-P line and then reconnecting the voice line using standalone UNE elements. Thus, SBC's proposed NRCs for the UNE-P to line splitting scenario in these two states reflect charges for disconnecting the existing UNE-P line, placing new service orders, and installing a standalone loop and a standalone port. In each case separate loop and port connection charges are levied even though the end user is currently receiving voice service from those already combined elements. In this way, SBC treats line splitting as a new combination of standalone elements rather than UNE-P, with the goal of imposing additional costs on CLECs. This approach – including artificial inefficiencies in the pricing structure for line splitting non-recurring charges – is totally inconsistent with the requirement of this Commission that costs be forward-looking.

Line sharing to line splitting: Under this scenario, a customer may move its voice service from SBC to a CLEC and retain its current data provider (if data is provided by a CLEC)[28] or move both its voice and data services. If the customer is moving only its voice service and is retaining its existing data provider, this change is simply a migration of voice service to the CLEC with no change in the physical configuration of the facilities used. The appropriate NRC in such a case is the applicable UNE-P migration charge. If the data carrier is

[28] Generally, SBC and other incumbent LECs will not provide (xDSL) data service on a line served by a CLEC using UNE-P.

also changing, then the cost of installation of two cross connects is also needed in addition to the UNE-P migration charge. In such a case, the appropriate NRC is the sum of these two cross connect charges (approximately $11) and the UNE-P migration charge, for a total of approximately $11-$12, depending on the applicable UNE-P migration charge for each state.

However, for this line sharing to line splitting scenario, SBC has proposed NRCs that are clearly inflated and arbitrary, based on SBC's false premise that it may disconnect the existing UNE-P connection along with the data service and then provide a new standalone loop and a standalone port. In addition, contrary to TELRIC cost causation requirements, SBC seeks to impose these charges without regard to whether the customer changes its data service, even though it violates basic cost causation principles to impose the same NRCs on a customer that changes its data carrier (and requires installation of cross connects) and on the customer that keeps its data carrier (and requires only a UNE-P migration charge). Moreover, as discussed above, SBC bases its NRCs on UNE charges that have no relation to line splitting, and such charges can in no way be deemed to be TELRIC compliant. Finally, SBC's various state NRCs are inconsistent in that SBC's Wisconsin NRCs include a standalone loop connection charge while Illinois's and Indiana's line splitting NRCs do not. It makes no sense that SBC would have to install a standalone loop in Wisconsin, but not in Illinois or Indiana to perform the exact same line splitting conversion. SBC and other ILECs should be put to the test of proving that it will roll a truck and install a new loop every time this conversion is ordered. Of course, SBC will not install a new loop. The loop is there and working. Either SBC will incur a migration expense (and nothing else) or SBC will incur a migration expense and perform a single cross connect. Either way, the price of line splitting related charges must reflect the forward looking

work that an efficient provider would do to provision these services. In no event should the charges reflect work that is not even performed today.

Covad urges the Commission to issue guidance in this proceeding regarding the appropriate pricing of line splitting non-recurring charges in compliance with TELRIC. Specifically, the Commission must require that the state commissions review the actual forward looking work steps required to make simple migrations to line splitting. On an interim basis, until such time that the state commissions evaluate how these migrations would occur in a forward looking environment, the ILECs should not be permitted to recover for more than a single service order and should be prohibited from imposing unsubstantiated loop installation charges. In subsequent state commission TELRIC proceedings, the ILECs should bear the burden of proving that a forward looking cost would include more than a single service order and would include loop installation charges for a loop that is already installed and working.

B. Non-Recurring Costs Recovered Through Recurring Charges

The Commission inquires as to the appropriateness of recovering non-recurring costs through recurring charges, specifically inviting comment on the principles that state commissions could apply in identifying the appropriate costs to recover through non-recurring charges.[29] The Commission's rules currently allow state commissions to require incumbent LECs to recover non-recurring costs through recurring charges "over a reasonable period of time."[30] While Covad lauds the pro-competitive intent behind this rule, in practice it has often proven to be a source of significant gaming opportunities and over-recovery for incumbents.

[29] *See NPRM* at para. 125.

[30] 47 C.F.R. § 51.507(e).

Specifically, in some states, non-recurring costs are recovered through recurring charges in perpetuity, rather than solely for a "reasonable period of time." Because these non-recurring costs reflect non-recurring activities by the incumbent LEC (e.g., build-out work, cross-connect work, etc.) rather than plant or equipment costs, there is no rationale for these recurring charges being assessed in perpetuity – contrary to the explicit language of the Commission's rules. By their very nature, these charges will eventually recover more than the cost of actually performing the non-recurring work, at which point the incumbent will begin to over-recover its costs for performing the work – in perpetuity.

To remedy this situation, Covad requests that the Commission clarify rule 51.507(e) in order to better enforce it. Specifically, the Commission should require states that allow incumbents to recover non-recurring costs through recurring charges "over a reasonable period of time" to explicitly identify (a) the total amount of the non-recurring cost being recovered; and (b) the total period of time over which this cost will be recovered as a recurring charge, after which the incumbent will no longer be permitted to assess this charge. By requiring states to identify up front the total amount of the non-recurring cost being recovered and the period of time over which it is to be recovered, Covad believes that the pro-competitive intent of rule 51.507(e) will be better served without allowing incumbents to over-recover their costs for non-recurring activities.

V. Loop Conditioning

Covad supports the Commission's proposal to allow charges for loop conditioning only in extraordinary circumstances, such as copper loops that exceed 18,000 feet in length.[31] Covad agrees that, as the Commission recognized in the *UNE Remand Order*, pursuant to industry

[31] *See NPRM* at para. 130.

engineering standards loops under 18,000 feet in length should be free of impairments such as load coils and excessive bridged taps.[32] Thus, loop conditioning activity to remove such impairments should not be necessary in a forward-looking network.

A forward-looking network architecture would not contain such load coils, excessive bridged tap or repeaters, because they violate the network engineering guidelines in place for over two decades. A forward-looking network is designed to meet CSA guidelines, which have been the standard for more than 20 years. A network built to CSA guidelines does not include inhibitors such as load coils and excessive bridged taps that require loops to be "deconditioned" before they can be used to provide DSL-based services. CSA guidelines contain parameters to minimize the use of bridged tap and load coils. All CSA loops are unloaded and are limited to 2.5kft of bridged tap with no single bridged tap longer than 2.0 kft. Thus, incumbent LECs could only propose non-recurring "conditioning"charges by proposing that their non-recurring charges be based on a different network architecture that is not forward-looking and does not eliminate conditioning costs. Indeed, a number of state commissions have already reached the conclusion that a forward-looking network does not require the removal of load coils and bridged taps for loops less than 18,000 feet in length. For example, the Maryland Public Service Commission rejected Verizon's proposed charges for loop conditioning,[33] as did the Massachusetts Department of Telecommunications and Energy.[34]

In addition, the Commission should take note of the fact that loop conditioning charges also allow incumbents to double recover the costs for providing unbundled access to loops.

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[32] *See NPRM* at para. 130.

[33] *See In the Matter of Arbitration of Rhythms Links, Inc. and Covad Communications Company vs. Bell Atlantic Maryland, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, MD PSC Case 8842, Phase II, Order 76852 at 34-35 (April 3, 2001).

Specifically, incumbent LEC cost models typically calculate recurring loop rates based on the assumption that all loops exceeding 18,000 feet in length are constructed of fiber feeder cable, and, thus, would not have been constructed using enhancements that preclude provision of xDSL service. At the same time, for the purposes of developing non-recurring charges for loop conditioning, incumbents also assume that these same loops exceeding 18,000 feet in length are made of only copper, and therefore would probably contain voice-enhancing equipment that would need to be removed. The assumption of different network architectures in the recurring and non-recurring cost studies for the same network element violates the forward looking economic cost requirement for total cost minimization and also leads to double-counting. The monthly recurring charge for basic unbundled loops should reflect the cost of a network that deploys fiber feeder and DLC for long loops. These monthly recurring charges will recover all costs for building a network without DSL inhibitors such as load coils and excessive bridged tap. Thus, every penny included in a stand-alone "conditioning" nonrecurring charge would duplicate a function (the provision of a "conditioned" loop) already fully incorporated in the forward-looking recurring cost for a loop. This mix and match approach of invoking inconsistent network architecture assumptions surely leads to double recovery for costs which should not ever be present in a forward-looking network.

VI. Collocation Pricing – Power Charges

Covad agrees with the Commission's suggestion that charges for DC power should be based on the number of amps consumed rather than the number of amps fused.[35] DC power

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[34] *See Order, Investigation By The Department On Its Own Motion As To The Propriety Of The Rates And Charges Set Forth in M.D.T.E. No. 17*, D.T.E. 98-57-Phase III at 101-103 (Sept. 29, 2000).
[35] *See NPRM* at para. 147.

charges to CLECs have a significant impact on a CLEC's costs. In resolving this issue, the Commission must be guided by the principle that CLECs should pay only for what they use and no more. If CLECs are not charged on an amps used basis, then CLECs will be required to pay substantially in excess of the costs they actually incur, and ILECs will be grossly overcompensated for the power they provide for CLEC collocation.

There can be a very large difference between the fused capacity serving a CLEC's collocation space and the actual usage that the CLEC's equipment draws over those fuses. In contrast to how CLECs are often required to pay for DC power on a fused amp basis, ILECs only pay for actual power consumption. ILECs do not pay for fused amps that are not used – just as a residence does not pay for fused amps that are not used. Furthermore, any questions regarding how plant investment would be paid for if CLECs were charged only on the basis of actual usage are questions about rate design and rate structure – not a basis for departing from the principle that CLECs, like ILECs, should only pay for what they use. A usage-based rate for DC power usage could easily be designed to recover not only for the actual power consumed but also the forward-looking plant investment required to deliver this power.

Some state commissions have already recognized the discriminatory and above-cost nature of billing power usage on a fused amp basis, and require that incumbents charge competitors only for the amount of power they actually use, for example, by metering competitors' power usage to determine this amount.[36] The Commission should provide valuable guidance in this area, by making clear that incumbents are required to bill for DC power usage on the basis of the amount of power that competitors actually use, not on the basis of the number of amps fused. Furthermore, the Commission should make clear that states may employ multiple

methods for determining the amount of power usage. For example, power usage could be determined by the installation of power meters, or, where power meters are not economical or practical, by the downward-adjusted List 1 drain for the equipment drawing power.[37] While states should be free to determine which of these options is most appropriate for the specific conditions in their states, it is critical for the Commission to implement at a federal level the general principle that DC power should only be billed according to the amount of power actually consumed, rather than the amount of power fused.

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[36] *See, e.g., In the Matter of Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport, and Termination of Traffic, ICC Docket No. 96-0486,*2nd Interim Order, (February 17, 1998), 1998 Ill. PUC LEXIS 109*,* at 254.

[37] The List 1 drain represents the manufacturer's maximum steady state drain for the equipment under normal power plant operating conditions. Equipment typically draws less power than this maximum steady state drain.

VII. Conclusion

The Commission's TELRIC NPRM represents an opportunity for bolstering competition by providing important clarifications to the Commission's TELRIC rules, as well as a significant risk to competition – for example, if the Commission drastically rewrites those rules to incorporate a backward-looking or short-run cost methodology. The Commission can easily incorporate the real-world network attributes of incumbent LEC networks in a way that makes TELRIC cost models more accurate representations of the cost conditions that an efficient carrier faces, without rewarding incumbents for the inefficiencies solely within their control. Furthermore, the Commission can provide the important clarifications to its TELRIC rules that Covad has suggested herein for line splitting non-recurring charges and for DC power charges. Regardless of how the Commission decides to revise its TELRIC rules, Covad urges the Commission not to subject competitors and state commissions to the extraordinary drain of time and resources that a mandatory timetable for implementing new TELRIC rules would impose. Instead, state commissions should be free to initiate new cost dockets according to their own determinations of need and resources, until which time existing rates would remain in effect.

Covad urges the Commission to adopt the proposals presented herein.

Respectfully submitted,

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